IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BURTON	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF	:	
PROBATION & PAROLE, et al.	:	
Defendants.	:	**NO. 02-2573**

M E M O R A N D U M

Reed, S.J. **June 13, 2002**

Plaintiff James Burton ("Burton") filed this lawsuit against the Pennsylvania Board of Probation & Parole ("the Board"), Edward Jones ("Jones") and Daniel Solla ("Solla") under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951, et seq., The Civil Rights Act of 1866, 42 U.S.C. § 1981, as well as state tort law. Burton alleges that he was retaliated against, subjected to a hostile work environment, and constructively discharged from his position because of his race. Presently before the Court is the motion of defendants to dismiss (Document No. 6), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as well as the response thereto. Plaintiff contends that the complaint states each claim as required under the Federal Rules and in the alternative requests leave of Court to amend the complaint. For the reasons which follow, the motion will be granted in part with leave to amend one dismissed claim and denied in part.[1]

I. Background[2]

Burton is a Black male who was hired by the Board in or about December, 1990. In or

[1] Because this case raises a federal question, jurisdiction is proper pursuant to 28 U.S.C. § 1331.

[2] All facts are taken as true from the complaint, as required by law.

about January, 1997, he was promoted to Parole Supervisor. From approximately January, 2000 until his alleged constructive discharge in March, 2001,[3] Burton was the only Black male in that position. (Compl. ¶ 7.) Solla is the Deputy Director at the Board and was Burton's immediate Supervisor. Jones is the Director of the Board.

On May 10, 2000, plaintiff underwent angioplasty surgery. (Id. ¶ 14.) In or about August, 2000, Solla issued an unwarranted written reprimand of plaintiff for failing to follow-up on a case which blocked him from consideration of future potential promotions. (Id. ¶ 9.) White supervisors were allegedly not disciplined for the same infraction. (Id.)

Plaintiff asserts without reference to specific dates that "at one point" he was assigned almost twice the number of cases as compared to his co-workers. (Id. ¶ 10.) When he discussed his concern over this uneven case assignment with Solla, Solla responded by giving Burton the "most problematic" cases. (Id. 11.) No approximate date is alleged with respect to this conversation. Burton asserts, again without reference to dates, that Solla would (1) discipline Burton as of right without first discussing his performance informally; (2) not provide the same one-on-one supervision that he offered to the other supervisors, and would place post-it notes on the door (presumably to Burton's office) if Burton was more than one minute late to work in the morning while White Supervisors were not similarly rebuffed. (Id. ¶ 12(a)-(c).)

In October 2000, Burton spoke with Solla concerning a tee-shirt "frequently" worn by a Board Agent[4] which read: "Officer Danny Faulkner was murdered by Mumia Abu-Jamal who

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[3] The complaint fails to allege the date of plaintiff's alleged constructive discharge. The March date was taken from plaintiff's memorandum of law. (Pl.'s Mem. at 1.)

[4] The relationship between a Parole Supervisor, such as plaintiff, and a Board Agent, is not clear from the face of the complaint.

shouldn't be in an 8 x 10 foot cell. He should be 6 feet closer to hell."[5] (Id. at 13.) Burton explained to Solla that this shirt was offensive to many Black employees, particularly when it was worn while advising parolees. (Id.) Solla responded that there was nothing wrong with the tee-shirt and would not tell the employee he could not wear the tee-shirt to work. (Id.)

Plaintiff filed a complaint with the Pennsylvania Human Relations Commission on January 19, 2001 and received his right to sue letter on December 31, 2001. Burton's state charge of discrimination was forwarded to the EEOC, and plaintiff was notified of the dual filing on February 28, 2001. Burton filed this action in state court on or about March 30, 2002, and defendants removed the case on April 29, 2002.

II. Standard

Rule 12 (b) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

A motion to dismiss should be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King &

[5] This Court takes judicial notice of the fact that all parties involved in this matter, as well as this Court are familiar with the Mumia Abu-Jamal case.

Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, the proper inquiry is not whether a plaintiff will ultimately prevail, but rather whether a plaintiff is permitted to offer evidence to support its claims. See Children's Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir. 1999) (citation omitted). The moving party bears the burden of showing that the non-moving party has failed to state a claim for which relief can be granted. See Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). While all facts in the complaint must be accepted as true, this Court "need not accept as true unsupported conclusions and unwarranted inferences." Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184 (3d Cir. 2000), cert. denied, 121 S. Ct. 2000 (2001) (citations omitted).

III. Analysis

I note at the outset that employer liability under the PHRA follows the standards set out for employer liability under Title VII. See Knabe v. Boury Corp., 114 F.3d 407, 410 n.5 (3d Cir. 1997). The legal standard for a section 1981 case is likewise identical to the standard in a Title VII case. See Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n. 5 (3d Cir. 1983); Bullock v. Children's Hosp. of Philadelphia, 71 F. Supp. 2d 482, 485 (E.D. Pa. 1999). Thus, I will analyze Burton's claims only under Title VII below; however, my analysis and conclusions are equally applicable to his claims of discrimination in violation of the PHRA and Section 1981.[6]

A. *Hostile Work Environment Claim*

Hostile work environment harassment is actionable under Title VII and occurs when "the

[6] Defendants presented two arguments specific to the claims asserted under § 1981 and later withdrew each argument. One argument was withdrawn by way of a supplemental brief, (Document 8), in light of the recent United States Supreme Court opinion in Lapides v. Board of Regents of the Univ. Sys. of Ga., 122 S. Ct. 1640 (2002), which was handed down after defendants filed their motion. The remaining argument was withdrawn by a letter to my Chambers received on June 5, 2002.

conduct in question [is] severe and pervasive enough to create an 'objectively hostile or abusive work environment--an environment that a reasonable person would find hostile--and an environment the victim-employee subjectively perceives as abusive or hostile.'" Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993)). The following factors guide this Court in determining whether such a claim has been stated: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." Id. (quoting Harris, 510 U.S. at 23, 114 S. Ct. at 371).

Plaintiff alleges that: (1) he was issued an unfounded written reprimand which blocked any opportunity for a future promotion; (2) he was given substantially more work than the White Supervisors, and that his assignments included the most problematic cases; (3) his Supervisor humiliated him by placing post-it notes on his door if he was only one minute late for work while White Supervisors were not similarly rebuffed; (4) he was disciplined without first following informal discussion procedures; (5) Solla did not extend him the same kind of one-on-one supervision that he offered to the White Supervisors; (6) Solla refused to take action and prevent another employee from wearing an anti-Mumia tee-shirt that Burton and other Black employees found offensive, despite the fact that Burton discussed the offensive nature of the tee-shirt directly with Solla.

In support of his claim, Burton presents in his response memorandum only conclusory arguments without ever applying the specific alleged incidents to the actual severe and pervasive standard. By way of example, this high standard has been held to have been met in a situation

where over a seven year period Black employees were, *inter alia*, consistently referred to as "another one," "one of them," "that one there," "all of you," and hurled insults such as "don't touch anything," and "don't steal." See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996). This Court is quite cognizant of the fact that a hostile work environment claim is very fact-specific and therefore the allegations before me need not be precisely the same as the example offered. I present Aman as an illustration of the type of harm the severe and pervasive standard is meant to address. Burton fails to allege any similarly flagrantly abusive conduct. His allegations are rather in the nature of disproportionate work assignments and unfair reprimands. The tee-shirt incident, even if legally offensive, is an isolated incident. I therefore conclude that the accusations contained in the complaint fail as a matter of law to amount to a hostile or abusive work environment. See, e.g., Stone v. West, 133 F. Supp. 2d 972, 987 (E.D. Mich. 2001) (isolated offensive comments, vague complaints of being given more onerous work assignments and a dispute concerning the proper designation of vacation and sick time off do not amount to a hostile work environment); Kahn v. Dep't of Treasury, No. Civ. A. 98-2652, 1999 WL 1220765, at *1, *3 (E.D. La. Dec. 20, 1999) (unfair evaluations, delayed leave request, additional work assignments and change in work assignment area, as well as isolated reprimand fail to constitute abusive work environment).

I therefore grant the motion of defendants to dismiss this claim; however, I will grant leave to plaintiff to cure the defects noted above. In so allowing, however, I instruct plaintiff that if the facts will permit, in order to state a claim under the law, he must allege incidents which meet the legal standard and not allege incidents that are in the same nature as the incidents already alleged.

A. *Constructive Discharge Claim*

To establish a *prima facie* case of race discrimination, Burton must allege that (1) he is in a protected class, (2) is qualified for the position, (3) suffered an adverse employment action, and (4) was discharged under circumstances that give rise to an inference of unlawful discrimination. See Duffy v. Paper Magic Group, 265 F.3d 163, 167 (3d Cir. 2001); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999). A constructive discharge amounts to an adverse employment action.[7] See Duffy, 265 F.3d at 167. In order to establish a constructive discharge, "a plaintiff must show that 'the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.'" Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996) (quoting Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984)). The employee must demonstrate that "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992) (quoting Goss, 747 F.2d at 887-88).

In determining whether Burton has stated such a claim, I emphasize that the standard of notice pleading under the Federal Rules is extremely lenient. See, e.g., Weston, 251 F.3d at 429-30 (concluding that claim met liberal pleading standard despite fact that plaintiff did not present "the most compelling of Title VII hostile work environment claims," and that if the case had

[7] Interestingly, the Court of Appeals for the Third Circuit has recently acknowledged that in the context of a claim for a hostile work environment, in which defendant is afforded an affirmative defense if no tangible employment action is taken, the courts are in disagreement as to whether a constructive discharge is a tangible employment action. See Cardenas v. Massey, 269 F.3d 251, 267 n.10 (3d Cir. 2001). The court noted, however, that in this circuit, a constructive discharge has been held to constitute a tangible employment action thereby preventing a defendant from seeking refuge in the affirmative defense allowed in a hostile work environment claim. See id. (citing Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999)).

been appealed from a grant of summary judgment, the outcome would likely be different). The present complaint, viewed in the light most favorable to plaintiff, tells the story of an employee who was the only Black employee at his level for at least a year, who was given more onerous work assignments as compared to his White co-employees, was unfairly and disproportionately reprimanded on numerous occasions, and one written reprimand thwarted any future potential promotions. If in fact plaintiff is actually able to prove these accusations, a reasonable jury could conclude that Burton was constructively discharged.

Defendants contend that under Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993), Burton's claim must be dismissed. In Clowes, the Court of Appeals noted that the plaintiff could not rely on many of the factors commonly cited by employees who bring forth claims of constructive discharge. The Court observed that the plaintiff was neither threatened with discharge nor urged to resign; she likewise was not demoted, did not receive a pay cut, was not involuntarily transferred, her job responsibilities were not altered, and she did not receive poor evaluations. See id. The Court of Appeals has since clarified, however, that the factors outlined in Clowes are not necessary for recovery. See Duffy, 265 F.3d at 168. In addition, according to the complaint, Burton was allegedly prevented from any future promotion and his job responsibilities were allegedly altered in that he was given substantially more work than his White co-employees, and was allegedly given the more difficult case assignments.

The Court of Appeals for the Third Circuit has expressly recognized that while discrimination continues, violators have stopped leaving behind the proverbial "smoking gun," and that courts must be increasingly vigilant in their efforts to ensure that illegal conduct is not approved under the auspices of legitimate conduct. See Aman, 85 F.3d at 1082. With this

admonition, and with the liberal pleading standards governing this motion, I conclude that Burton has stated a claim for constructive discharge.

B. *Retaliation Claim*

To establish a *prima facie* case of unlawful retaliation, a plaintiff must demonstrate that: (1) he or she engaged in activity protected by Title VII; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse employment action. See Weston, 251 F.3d at 430.

With respect to the first element, in addition to protecting the filing of formal charges of discrimination, Title VII protects informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges. See Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 288 (3d Cir. 2001) (citations omitted). Both informal or verbal complaints are protected. See, e.g., Jones v. WDAS FM/AM Radio Stations, 74 F. Supp. 2d 455, 463-64 (E.D. Pa. 1999). An employee does not need to prove that the conduct about which she is complaining is actually in violation of anti-discrimination laws; rather, she only has to have a good faith, reasonable belief that the complained of conduct was unlawful. See Aman, 85 F.3d at 1085; Barber v. CSX Distribution Services, 68 F.3d 694, 701-02 (3d Cir. 1995) (holding that because letter complaint to human resources did not actually mention age discrimination, it could not constitute protected activity).

According to the complaint, Burton made two informal complaints to Solla. First, he

alleges that he "expressed concern . . . about the disparate number of cases defendant Solla assigned to him as compared to his colleagues." (Compl. ¶ 11.) This assertion is problematic because Burton fails to allege that when he presented this problem to Solla, he felt that he was being given extra assignments because of racial animus. In other words, it is not clear whether he was making a good faith complaint of unlawful conduct.

Burton's second complaint to Solla concerned the anti-Mumia tee-shirt. Defendants argue that Burton's complaint was divorced from any claim of discrimination and rather addressed office morale. While the complaint provides that Burton spoke to Solla because of office morale, it also provides that several Black employees, including Burton, were offended by the tee-shirt. (Compl. ¶ 13.) Although the complaint surely could have been written with greater precision, I nonetheless conclude that it can fairly be inferred from the face of the complaint that when Burton complained to Solla about the offensive nature of the tee-shirt, Burton held a good faith belief that allowing the employee to continue to wear the tee-shirt, in the face of the grievance by Burton, was a form of unlawful racial discrimination on the part of Solla. Thus, Burton's complaint about the tee-shirt constitutes protected activity.[8]

The second element, which requires an allegation of adverse employment action, is satisfied by and dependent upon the claim for constructive discharge. The inquiry into the third element, proof of a causal link, generally focuses on timing and proof of ongoing antagonism. See Abramson, 260 F.3d at 288. Thus, Burton can establish a link between the complaint he

[8] Plaintiff also argues that he engaged in protected activity by filing his PHRC complaint. The fatal flaw in this argument is that the complaint fails to establish his last date of employment with the Board. Therefore, it is not clear that this protected activity occurred before Burton's alleged constructive discharge. Thus there is no factual basis for the alleged retaliation claim.

made regarding the anti-Mumia tee-shirt and his subsequent alleged constructive discharge if defendants engaged in a pattern of harassment or antagonism during that intervening period. See id.; Woodson v. Scott Paper Co., 109 F.3d 913, 920-21 (3d Cir. 1997). Again, while the complaint is not a model of clarity and fails to establish a coherent time-line of alleged misconduct, it can fairly be inferred that the alleged misconduct occurred at least from the time when Solla refused to bar the wearing of the tee-shirt up to the point of his alleged constructive discharge. I therefore conclude that under the very liberal pleading standards, Burton's retaliation claim survives this motion to dismiss.

D. *Intentional Infliction of Emotional Distress Claim*

Defendants seek refuge from liability for the claim of the intentional infliction of emotional distress under their statutory right to sovereign immunity. See 1 Pa.C.S. § 2310; 42 Pa.C.S. § 8521. Under this doctrine, Commonwealth agencies and the employees of such agencies acting within the scope of their duty, are protected from the imposition of liability for intentional torts. See 1 Pa.C.S. 2310 ("officials and employees acting within the scope of their duties ... shall continue to enjoy sovereign immunity and official immunity"); La Frankie v. Miklich, 152 Pa. Cmwlth. 163, 170, 618 A.2d 1145, 1149 (1992); Faust v. Pennsylvania Dep't of Revenue, 140 Pa. Cmwlth. 389, 397, 592 A.2d 835, 839 (1991). The nine exceptions to the general rule of immunity provided for in the Code must arise out of negligent acts, and therefore do not include intentional torts. See 42 Pa.C.S. § 8522; Frazier v. Southeastern Pennsylvania Transp. Auth., 868 F. Supp. 757, 762 (E.D. Pa. 1994) ("a Commonwealth party cannot be held liable for damages arising out of intentional torts."); Adams v. McAllister, 798 F. Supp. 242, 247 (M.D. Pa. 1992), aff'd, 972 F.2d 1330 (3rd Cir. 1992) (granting sovereign immunity for claims of

intentional infliction of emotional distress and defamation).

The Board is considered a Commonwealth agency. See Storch v. Pennsylvania Bd. of Probation and Parole, 68 Pa. Cmwlth. 74, 81-82, 449 A.2d 760, 765 (1982). Sovereign immunity extends to intentional tort claims asserted against Commonwealth employees in their individual capacities. See Perlmutter v. Pettus, No. Civ. A. 01-1663, 2001 WL 1169215, at * 2 (E.D. Pa. Oct. 1, 2001); McGrath v. Johnson, 67 F. Supp. 2d 499, 511 (E.D. Pa. 1999); Dill v. Oslick, No. Civ. A. 97-6753, 1999 WL 508675, at * 4 (E.D. Pa. July 19, 1999); Tinson v. Pennsylvania, No. Civ. A. 93-3985, 1995 WL 581978, at * 7 (E.D. Pa. Oct. 2, 1995); Maute v. Frank, 441 Pa. Super. 401, 403, 657 A.2d 985, 986 (1995); La Frankie, 152 Pa. Commw. at 171, 618 A.2d at 1149.[9] I therefore conclude that the motion of defendants to dismiss this claim in its entirety will be granted without leave to amend because such action would be futile.[10]

E. *Negligent Infliction of Emotional Distress Claim*

Burton bases his claim of negligent infliction of emotional distress on the discrimination claims, alleging that: "The racial discrimination, retaliation and work-related harassment caused plaintiff extreme emotional distress." (Compl. ¶ 50.) This claim is therefore defective because in order to sustain it, Burton must prove the underlying discrimination, and Title VII discrimination is an intentional, not negligent, act. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508, 113 S. Ct. 2742, 2748-49, 125 L. Ed. 2d 407 (1993). I therefore conclude that I will

[9] In contrast, the statute governing *municipal* liability bars immunity for intentional tortious conduct. See Dill, 1999 WL 508675, at *4.

[10] Under Federal Rule of Civil Procedure 15(a), "leave [to amend] shall be freely given when justice so requires." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (alteration in original). Leave to amend may be denied on grounds of undue delay, bad faith, dilatory motive, prejudice and futility. See id. Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted, under the same standard of legal sufficiency as Rule 12(b)(6). See id.

grant the motion of defendants to dismiss this claim in its entirety will be granted without leave for plaintiff to amend the complaint because such action would be futile.

F. *Qualified Immunity*

Under Title VII, a public official may be sued only in his official capacity; thus the doctrine of qualified immunity has no place because it protects against personal liability only. See In re Montgomery County, 215 F.3d 367, 372-73 (3d Cir. 2000), cert. denied, 531 U.S. 1126 (2001); Sheridan v. E.I. DuPont de Nemours and Co., 100 F. 1061, 1078 (3d Cir. 1996) (en banc). Accordingly, all claims asserted under Title VII against individual defendants will be dismissed without leave to amend the complaint. Unlike Title VII, individuals can be held liable under Section 1981.[11] See Cardenas v. Massey, 269 F.3d 251, 268 (3d Cir. 2001); Phillips v. Heydt, 197 F. Supp. 2d 207, 224 (E.D. Pa. 2002). The Court of Appeals for the Third Circuit has held individuals liable under Section 1981 "'when [the defendants] intentionally cause an infringement of rights protected by Section 1981, regardless of whether the [employer] may also be held liable.'" Cardenas, 269 F.3d at 268 (quoting Al-Kharzraji v. Saint Francis Coll., 784 F.2d 505, 518 (3d Cir. 1986)). If the individual defendants are "personally involved" in the alleged discrimination, and if they "intentionally caused" Burton's alleged infringed Section 1981 rights, or if "they authorized, directed, or participated" in the alleged discriminatory conduct, they may be held personally liable under Section 1981. Al-Kharzraji, 784 F.2d at 518.

According to the complaint, as detailed above, Solla is the actor who personally and

[11] With respect to qualified immunity under the PHRA, because the Pennsylvania legislature has waived the Commonwealth's sovereign immunity to claims asserted under the PHRA, that immunity is not available to shield individual defendants sued in their individual capacities from PHRA claims. See Irizarry v. Pennsylvania Dep't of Transp., No. Civ. A. 98-6180, 1999 WL 269917, at *4 (E.D. Pa. Apr. 19, 1999); Fitzpatrick v. Pennsylvania Dep't of Transp., 40 F. Supp. 2d 631, 635-36 (E.D. Pa. 1999); Mansfield State College v. Kovich, Pa. Cmwlth. 399, 401-02, 407 A.2d 1387, 1388 (1979).

intentionally caused the alleged discrimination against Burton. Thus, I conclude that Solla is not entitled to qualified immunity. The complaint, however, does not assert that Jones is responsible for a single affirmative act. Accordingly, I conclude that Jones is entitled to qualified immunity on the face of this complaint; however, plaintiff will be permitted to amend his complaint if the facts permit.

IV. Conclusion

This Court concludes that pursuant to Federal Rule of Civil Procedure 12(b)(6), plaintiff has failed to state a claim for a hostile work environment and will be granted leave to amend his complaint. Burton has stated a claim for both constructive discharge and retaliation under this liberal rule. Plaintiff has failed to state a claim for both the intentional and negligent infliction of emotional distress claims and will not be granted leave to amend either claim. Each defendant is entitled to individual and personal immunity under Title VII, defendant Jones is entitled to qualified immunity under Section 1981, and neither individual defendant is entitled to immunity under the PHRA.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BURTON	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
PENNSYLVANIA BOARD OF	**:**	
PROBATION & PAROLE, et al.	**:**	
Defendants.	**:**	**NO. 02-2573**

O R D E R

AND NOW this 13th day of June, 2002, upon consideration of the motion of defendants the Pennsylvania Board of Probation & Parole, Edward Jones and Daniel Solla to dismiss (Document No. 6), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the response thereto which requests in the alternative that plaintiff James Burton be granted leave to amend his complaint, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that:

1. The motion to dismiss Counts I, III and IV to the extent that those Counts asserts a claim for hostile work environment pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S. § 951, et seq., and The Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), is hereby **GRANTED** and the claim **DISMISSED** and plaintiff is **GRANTED** leave to amend the complaint to replead this claim.
2. The motion to dismiss Counts I, III and IV to the extent those Counts assert a claim for constructive discharge pursuant to Title VII, the PHRA and Section 1981 is **DENIED**.
3. The motion to dismiss Counts II, III and IV to the extent that those Counts assert a claim for retaliation pursuant to Title VII, the PHRA and Section 1981 is **DENIED**.
4. The motion to dismiss Counts V and VI for intentional and negligent infliction of

emotional distress is **GRANTED** and those claims are **DISMISSED** with prejudice and plaintiff is **DENIED** leave to amend the complaint to replead those claims.

5. The motion for Edward Jones and Daniel Solla to be granted immunity for acts committed in their individual capacity as alleged under the PHRA in Count IV is **DENIED**.

6. The motion for Edward Jones and Daniel Solla to be granted immunity for acts committed in their individual capacity as alleged under Title VII in Count II is **GRANTED** and plaintiff is **DENIED** leave to amend the complaint to replead those claims.

7. The motion for Edward Jones to be granted qualified immunity under Section 1981 in Count III is **GRANTED** and plaintiff is **GRANTED** leave to amend the complaint to replead this claim.

8. The motion for Daniel Solla to be granted qualified immunity under Section 1981 in Count III is **DENIED**.

IT IS FURTHER ORDERED that, no later than July 14, 2002, if the facts and Rule 11 will allow, plaintiff James Burton may amend the complaint as to his claim for a hostile work environment pursuant to Title VII, the PHRA and Section 1981 as well as his claim against defendant Edward Jones for acts committed in his individual capacity under Section 1981, based upon the instructions in this Order and the foregoing memorandum, and defendants the Pennsylvania Board of Probation & Parole, Edward Jones and Daniel Solla shall answer the amended complaint no later than July 5, 2002.

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LOWELL A. REED, JR., S.J.